

REMARKS/ARGUMENTS

Claims 1-34 are pending in this application.

The Examiner has requested an election of one of the following species:

- a) a nucleic acid vector without an insert;
- b) a fragment of a vector without a gene insert;
- c) an oligonucleotide;
- d) a non-coding nucleic acid sequence from a regulatory region of a DNA;
- e) a non-coding nucleic acid sequence from an intron;
- f) a non-coding nucleic acid sequence from a regulatory region of an RNA;
- g) a nucleic acid from a coding strand of a DNA which does not express a protein/peptide;
- h) a nucleic acid from an RNA that does not express a protein/peptide; and
- i) a non-coding nucleic acid sequence not associated with a gene.

Applicants hereby elect Group “a) a nucleic acid vector without an insert.” This election is made based upon the understanding that Group a) was meant to read “a nucleic acid vector without a gene insert.” [Emphasis added.] The word “gene” should be included in Group a) so that it matches the language in the pending claims and the corresponding language in Group b).

A second election has been requested to one of the following species of nucleic acids, which encodes cytokines:

- a) IL - 2
- b) IL - 12 and
- c) IFN - gama.

For the second species election, Applicants select Group c) IFN - gama.

Claims 1, 2, 4-8, 10-20, 24 and 30-33 are readable upon these elections.

Applicants traverse the second election of species, by pointing out that a requirement for an election of species must be based upon 37 C.F.R. § 1.141(a) and § 1.146.

These sections expressly recognize that "a reasonable number" of species may be claimed along with an allowable generic claim. Applicants respectfully note that there has been no demonstration that "more than a reasonable number of species" is encompassed by the pending claims. Applicants have listed three species of the cytokines, see Claim 18, for example. Therefore, the species election requirement is deficient, because no more than a reasonable number of species is claimed.

Moreover, and as set forth at 37 C.F.R. § 1.146, election of species is discretionary and results in a restriction *only* "if no claim to the genus is found to be allowable." Thus Applicants respectfully submit that the requirement for an election of species is for purposes of facilitating search and examination. If no prior art is found to anticipate or render obvious the elected species, Applicants respectfully submit that the search of the claims should be extended to the next species to allow for consideration of the generic claim.


In light of the above, Applicants respectfully submit that the requirement for a second election of species is misplaced and should be withdrawn.

CONCLUSION

Applicants reserve the right to pursue the subject matter of any non-elected claim or canceled subject matter in a subsequent divisional or other continuing application without prejudice.

If the Examiner believes a telephone conference would expedite prosecution of this application, please telephone the undersigned at 858-350-6108.

Respectfully submitted,


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